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### **International Watercourses Law for the Twenty-First Century: The Case of the River Ganges Basin [Review of: S. P. Subedi (2007) International Watercourses Law for the Twenty-First Century: The Case of the River Ganges Basin]**

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#### ***published in***

Review of European Community & International Environmental Law  
2007

#### ***DOI (link to publisher)***

[10.1111/j.1467-9388.2007.00550\\_5.x](https://doi.org/10.1111/j.1467-9388.2007.00550_5.x)

#### ***document version***

Publisher's PDF, also known as Version of record

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#### ***citation for published version (APA)***

Gupta, J. (2007). International Watercourses Law for the Twenty-First Century: The Case of the River Ganges Basin [Review of: S. P. Subedi (2007) International Watercourses Law for the Twenty-First Century: The Case of the River Ganges Basin]. *Review of European Community & International Environmental Law*, 16(2), 254-256. [https://doi.org/10.1111/j.1467-9388.2007.00550\\_5.x](https://doi.org/10.1111/j.1467-9388.2007.00550_5.x)

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in general, she does not provide an elaboration for the climate regime.

Another point that could have been explained in more detail is how Rajamani regards the Kyoto Protocol's Clean Development Mechanism (CDM) as a 'direct emanation of the CBDR principle'. Admittedly, the CDM does promote cooperation between industrialized and developing countries to pursue the common objective of reducing greenhouse gas emissions. However, the CDM is equally supposed to contribute to sustainable development in the host countries of the CDM projects – and its track record on this matter is ambiguous.

Given the publications in international legal literature on differential treatment and CBDR, one might expect this book to have difficulties finding a niche. However, this is not at all the case, as Rajamani presents her argument for differential treatment, as well as its limits, in a convincing and novel way, whilst staying aware of what has been written by other scholars.

Overall, *Differential Treatment in International Environmental Law* provides an important contribution that sheds light on the relations between unequals in international environmental law. Although the book is largely accessible for scholars and students of international law, it may be more appropriate for those with some basic understanding of international environmental law, and international law on climate change in particular. Perhaps, more importantly, policy makers and negotiators could benefit from the clear way in which Rajamani sets out the diverging stances of industrialized and developing countries, thereby laying bare where the gaps lie that need to be bridged.

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**International Watercourses Law for the Twenty-First Century: The Case of the River Ganges Basin**, edited by *Surya P. Subedi*, published by Ashgate, 2005, 258pp, £65.00, hardback.

There have been a relatively large number of books emerging in the market on international watercourses law. What makes this book special is its focus on implications for the River Ganges. This edited volume provides an overview of international issues, before examining the Ganges Basin, and deals with some comparative elements, before reverting to some national law issues. In terms of the overall structure, the first part provides a fairly good overview of international water law issues, and part 2 provides an interesting overview of the international law issues concerning the Ganges. However, part 3 and part 4 are a little unsatisfying. Part 3 discusses the Rhine and the Mekong, but only on the latter are attempts made at some comparison with the Ganges, and part 4 discusses national developments in Nepal and Bangladesh but does not cover India (or China for that matter)! Thus, as a whole, the book provides only a very partial picture. The three-page introduction merely reveals how the book developed, but does not make any effort at integrating the information from the different chapters to show what the implications are for the Ganges. This is a pity.

The first chapter by Surya P. Subedi is a systematic summary of the development of international watercourses law and its main focus is to elaborate on the point that the UN Convention on the Law of the Non-Navigable Uses of International Watercourses ('the Watercourses Convention') focuses more on demand management (using demand in a very specific sense of the term), rather than resource management, and that the emphasis given to environmental

and ecosystem-related issues is rather low. He then concludes that some of the deficiencies in this law have been dealt with in the 2004 Berlin Rules of the International Law Association (ILA).

The following chapter is on the current state of development of international water law. This chapter discusses various principles of sovereignty with respect to water law, the Watercourses Convention and the work of the ILA, starting with the Helsinki Rules of 1966 and ending with the Berlin Rules of 2004. The chapter provides a more complete overview of the current situation in the area of international water law. The two chapters complement each other.

Part 2 looks at the Ganges. Ramaswamy Iyer points out that the Ganges, Brahmaputra and Meghna basins are interlinked, and, as such, it is one big basin. Therefore, the discussions to deal with this river should in fact look at the entire basin. He argues that there are enough legal principles and remedies available to guide the three countries to manage their common water resources, but that the politics of the situation is complex as Nepal and Bangladesh do not trust their big neighbour and India is not sensitive to 'small-country touchiness, diffidence and proneness to suspicion' (at 51). He submits that discussions on water demand in these countries tend to focus on projections of increased water demand that have to be met by mega projects. They do not take into account the limited water resources available in the rivers (also given their other ecosystem functions), the options for water harvesting and watershed development, nor the need to curtail the growing demand for water through creative options. Finally, the author argues that basin planning is a hydrological concept that ignores the ecosystems around, and such planning inevitably 'contains within itself the seeds of centralization and gigantism' (at 57). He raises a

number of issues. If water is a key element to promote prosperity, then why do water-rich States in India not prosper? A supply-side focus is also seen as limited. He questions whether the private sector can play a key role in water supply as he cannot understand why they should be interested in such a highly capital-intensive sector that has a long gestation period and produces modest returns. Besides, he does not see how the private sector can handle the ecosystem services, or the social and environmental impacts of such water projects. He suggests that societies have to learn to live with water, not aim to manage and harness it. Such living with nature in harmony is the key to living with neighbours in harmony. This is a very thought-provoking chapter.

B.S. Chimni then examines the Ganges and Mahakali Agreements in light of the Watercourses Convention. The author presents the two agreements and compares the content with the Watercourses Convention. He concludes that both agreements are a step forward in regional cooperation; that the principles of the Watercourses Convention provide room for pragmatic negotiations between countries to share the resources; that, in essence, the sharing problem can only to some extent be resolved if all three countries look at the demand side of the water issues as well and seek ways to conserve the resources; that water should be declared as a human right; and that a dialogic process should be set up to ensure continuing cooperation between the countries.

Anjan Datta looks at the Bangladesh-India treaty on the Ganges, gives a detailed historical account of the sharing of Ganges waters and shows that the recent agreement is aimed at providing security of flow to Bangladesh. However, while agreement has been reached on paper, because of enhanced upstream extraction of water in India, the actual implementation of the agreement has been poor.

He concludes that there is a need for regional cooperation with Nepal, but also much more action within India to ensure that water conservation measures are taken and abstraction in the upper reaches are limited.

Graham Chapman looks at the natural and human environment of the Ganges-Brahmaputra-Meghna Rivers. He examines the geophysical components, the rainfall regimes and seasonality, the sediment flux, and the demographic background, before moving to an analysis of the demand and supply side of water. Most of the demand for water comes from the agricultural sector (90%), while most of the remaining water goes to the urban sector. Chapman explains that since water demand exceeds water supply, various options for enhancing access to water have been used, including exploiting ground water, inter-basin transfers and recycling existing water. Of these, water recycling is a key issue that needs further development. Water quality remains a sensitive issue. The author concludes that addressing the problems in this region will require considerable effort and a large number of parallel actions; not one large Politburo-type mega scheme. He concludes that 'implementable legal frameworks will have to tread a path of acute local political sensitivity' (at 145).

The comparative chapters look at the Rhine in a comprehensive account by André Nollkaemper, and the Mekong by Bantita Pichuakorn. Nollkaemper traces how the legal regime of the Rhine has changed over time and how the 1999 Convention for the Protection of the Rhine has led to a focus on sustainable development and protection of ecosystems rather than equal apportionment. While he questions whether States will be in a position to implement the agreement, he concedes that it sets the new benchmark for river instruments. The Mekong chapter also highlights the progress made in the legal regime and focuses on the notion of sustainable develop-

ment. The author suggests that the Mekong regime provides useful lessons on how the Ganges Brahmaputra regime should further develop, arguing that a duty to maintain flow and promote sustainable development should be the cornerstones of the regime. The need to consider water quality and quantity in an integrated manner is emphasized. However, the author also notes that since both regimes involve developing countries, some instruments like environmental impact assessments should not be made legally binding but their use should be increasingly encouraged.

The national perspectives part includes an interesting chapter on Nepal by Surya Nath Upadhyay. The chapter briefly shows how colonial water law has shaped and evolved into post-colonial times. He also shows that although water is owned by the State under current water law, the Local Self Governance Act 1988 deals with ownership very differently, leading to confusion regarding the allocation of responsibilities with respect to water. It deals with water rights, dispute settlement, quality aspects, sustainable development and cooperation with neighbouring States. The author concludes that although the Water Resources Act 1992 makes a good attempt, there are still problems of overlapping, contradictory, repetitive and concurrent jurisdictions leading to confusion. These need to be resolved in the coming years. The author further argues that inter-State cooperation will only work once different national parties and sectors come to agreement about how they should deal with their neighbours. Inter-State agreement does not automatically lead to implementation.

Mohammad Humayun Kabir discusses the situation in Bangladesh, focusing on the national policy and the legislative framework. The 1997 National Water Policy provides a comprehensive approach specifying objectives, sectoral policies and the notion of river basin management.

Ownership of water resources is vested in the State. The policy calls for a new water law, which would be harmonized with older water-related legislation. While the policy is seen as including a number of modern concepts – such as participatory approaches, sustainable development and integrated management – the question of implementation remains challenging, especially in the context of the fact that the rivers are shared with neighbouring countries.

Trilochan Uprety looks at Nepalese water resources and the relationship with India. The author argues that since Nepal is less developed than India, India should accept the development aspirations of Nepal and suggests that the Columbia River Treaty could be a useful model for Indo-Nepal relations on water. He submits that there are a number of potential solutions to the problems between the two nations; but that the real problem is not the lack of solutions but the lack of political will to address these problems.

Surya Subedi then concludes with a three-page analysis of the implications of the book for the Ganges. Given that most authors in this volume conclude that the problem is not so much legal but political, it is a pity that the book does not look at what the precise nature of the political problem is and how that can be resolved. All in all, the book is useful for those studying the Ganges and the complexities of the river governance. It is a state-of-the-art reflection of what is happening at present in these three countries.

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**America's Changing Coasts: Private Rights and Public Trust**, edited by *Diana M. Whitelaw* and *Gerald R. Visgilio*, published by Edward Elgar Publishing, 2005, 248pp, £59.95, hardback.

Reflecting the outcome of an interdisciplinary conference held in March 2003 at the Goodwin-Niering Center for Conservation Biology and Environmental Studies (of Connecticut College, New London, USA), the focus of this book is adaptation to sea-level rise. Few people seem to be aware of the fact that sea levels on the coast of Texas have risen by more than 60 cm (2 ft) over the past century already, as shown by annual observations from Galveston (at 52, figure 4.1). Even though only part of that dramatic increase is officially attributed to global climate change, these figures – contained in a chapter by James G. Titus, lawyer and project manager addressing sea-level rise at the US Environmental Protection Agency (EPA) since 1982, whose outspoken warnings have long been on record<sup>1</sup> – are little short of frightening. As from June 2006, however, Titus 'was no longer allowed to discuss such issues publicly, and referred questions to the EPA press office, which would not allow him to speak about it on the record'.<sup>2</sup>

Inevitably, of course, environmental regulations to cope with, or anticipate, the consequences of sea-level rise will also conflict with traditional property rights in coastal areas. In the USA, the issue was highlighted in 2001 by a controversial US Supreme Court case, *Palazzolo v. Rhode Island et al.* (121 S. Ct. 2448 (2001)). In a partial reversal

of decisions by state courts below, under the 'takings clause' of the Fifth Amendment to the US Constitution, the Supreme Court had remanded a private landowner's compensation claim to the Rhode Island state courts, for re-assessment of the legitimacy of new legislative restrictions on coastal development.<sup>3</sup>

Much of the legal discourse in this book revolves around *Palazzolo*, as argued out in contributions by lawyers from both sides – with Rhode Island's Assistant Attorney-General Michael Rubin discussing the 'reciprocity of advantage' concept raised in the case (at 69–87), and plaintiff's attorney Michael E. Malamut pondering future implications for 'buildable lots' (at 88–106). Although the *Palazzolo Case* has since been finalized on remand (by a Rhode Island Superior Court decision of 5 July 2005 – finding *no* regulatory taking), fears have been expressed that the case may well have a chilling effect on government regulators and, as a consequence, may 'further undermine environmental and community protections'.<sup>4</sup>

That *caveat* comes from John D. Echeverria of the Georgetown Environmental Law and Policy Institute, who also contributed a chapter to this volume, weighing the policy options of 'regulating versus buying the coast' (at 29–49). The next chapter by James G. Titus in turn gives an overview of innovative land-use planning tools such as the 'rolling easement', aimed at ensuring that wetland conservation areas will be able to 'migrate' inland without otherwise restricting the use of coastal property (at 50–68). Megan Higgins of the Rhode Island Coastal Resources Management Center elaborates on tensions between public and private

<sup>1</sup> See J.G. Titus, 'Does the US Government Realize that the Sea is Rising? How to Restructure Federal Programs so that Wetlands and Beaches Survive', 30:4 *Golden Gate University Law Review* (2000), 717.

<sup>2</sup> Interview by C. Dean, 'Next Victim of Warming: The Beaches', *New York Times* (20 June 2006), at F-1:1.

<sup>3</sup> For background, see G.J. Mangone, 'Private Property Rights: The Development of Takings in the United States', 17:2 *International Journal of Marine and Coastal Law* (2002), 195.

<sup>4</sup> J.D. Echeverria, 'A Preliminary Assessment of *Palazzolo v. Rhode Island*', 21:9 *Environmental Law Reporter* (2001), 11112, at 11112.